No. 83-1959

In the Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL JAMES MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner contends that the failure to register for the draft under the Military Selective Service Act, 50 U.S.C. App. (& Supp. V) 451 *et seq.*, is not a continuing offense. The district court accepted this argument (Pet. App. 125a-141a) and struck the allegations in the indictment concerning a continuing duty to register (*id.* at 141a, 156a). On the government's appeal, the en banc court of appeals reversed the district court's order with directions to reinstate the language stricken from the indictment, and remanded for further proceedings (*id.* at 94a-95a).[1]

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[1]Pursuant to Sup. Ct. R. 19.4, petitioner and Gary John Eklund have filed a consolidated petition for certiorari to review the judgments of the court of appeals in their cases. Because of the significant differences in the procedural posture of petitioners' cases and in the appropriate disposition of their claims by this Court, we are filing a separate response for each petitioner.

1. On October 22, 1982, petitioner was indicted in the Northern District of Iowa for failing to register with the Selective Service, in violation of 50 U.S.C. App. (& Supp. V) 453 and 462(a). The indictment alleged that "[b]eginning on or about July 27, 1980, and continuing until on or about August 20, 1982, * * * [petitioner] did knowingly and wilfully fail, evade and refuse to present himself for and submit to registration * * *" as required by law (Pet. App. 125a).

Petitioner moved to dismiss the indictment on selective prosecution grounds. He alleged that he was being singled out for prosecution because he had publicly opposed the Selective Service System and the draft. He also sought dismissal of the indictment, or, in the alternative, the striking of language as surplusage, on the ground that " 'it charges him with failing to fulfill a continuing duty to register whereas no such duty or offense exists under the law' " (Pet. App. 127a).

The district court held that petitioner was not entitled either to dismissal of the indictment or to an evidentiary hearing on the selective prosecution claim. It found that petitioner did not adequately establish that "the government ha[d] failed to take steps to prosecute other known non-registrants, other vocal non-registrants or even non-vocal non-registrants," and that, under the passive enforcement system, "[o]ther non-registrants similarly situated to [petitioner] are being prosecuted * * *" (Pet. App. 143a-144a). The court also concluded that, in any event, "[t]he government is clearly entitled to select those cases for prosecution which it believes will promote public compliance with the Selective Service registration laws" (*id.* at 146a).[2]

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[2]The court also rejected petitioner's arguments that Presidential Proclamation No. 4771 (45 Fed. Reg. 45247 (1980)) and the Selective Service regulations were procedurally invalid for failing to comply with certain notice-and-comment provisions (Pet. App. 147a-156a).

However, the district court granted petitioner's motion to strike the language in the indictment alleging a continuing violation of law (Pet. App. 125a-141a, 156a). The court relied on *Toussie* v. *United States*, 397 U.S. 112 (1970), which held that nonregistration was not a continuing offense for purposes of the statute of limitations that then existed, and it construed Congress's 1971 enactment of 50 U.S.C. App. 462(d) that disapproved *Toussie* merely to extend the limitations period but not to impose a continuing duty to register (Pet. App. 134a-137a).

2. Pursuant to 18 U.S.C. 3731, the government appealed the district court's order striking the continuing-offense language from the indictment. The en banc court of appeals, relying on its decision in the companion case of *United States* v. *Eklund*, 733 F.2d 1287 (Pet. App. 1a-87a), reversed and remanded for further proceedings on the full indictment (Pet. App. 94a-95a). The court of appeals subsequently stayed the issuance of the mandate pending the filing of a petition for certiorari and the final disposition of the case by this Court (Order of May 17, 1984).[3]

3. The only question presented by petitioner (see Pet. i-ii) is whether the failure to register with the Selective Service is a continuing offense. Whatever the merits of this issue, it is not currently ripe for review by this Court.[4] The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had

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[3]Petitioner did not seek to appeal (and could not have appealed) the district court's interlocutory rulings rejecting his claims of selective prosecution and procedural invalidity of the presidential proclamation and Selective Service regulations. Accordingly, the court of appeals had no occasion to consider these issues in this case.

[4]It is now nearly two years since the return of the indictment and more than 21 months since the district court's order. Further interlocutory review at this time would cause additional delay in the trial of the charges against petitioner.

denied his motion. If petitioner is acquitted following a trial on the merits, his contention will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his continuing-offense contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1984

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[5]Because the continuing-offense issue was raised and decided in Eklund's appeal from his conviction, we have addressed the merits of that issue in our response to his request for review by this Court.